

BEFORE THE  
POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

IN THE MATTER OF )  
FRANK B. SCHEIBE (*Surface* )  
*Water Application No. 22637*), )  
Appellant, )  
vs. )  
STATE OF WASHINGTON, )  
DEPARTMENT OF ECOLOGY, )  
Respondent. )

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PCHB No. 36

FINDINGS OF FACT,  
CONCLUSIONS AND ORDER

This involves a portion of an appeal from respondent's Report, Finding of Fact and Decision dated February 15, 1971, denying appellant's Surface Water Application No. 22637.

Formal hearing was held on that portion of the appeal relating to the proposed withdrawal of water for the purpose of a community domestic water supply from Peterson Spring, tributary to Huber Gulch Creek, Asotin County, agreement having been reached (Paragraph VII, Order Resulting from Informal Conference and Pre-Hearing Conference)

1 to hear that issue separately from issues relating to erection and  
2 maintenance of a dam for impoundment of water for recreational  
3 purposes.

4 The formal hearing of the Pollution Control Hearings Board  
5 (Walt Woodward, hearing officer) was held in the Council Chamber  
6 of the Clarkston City Hall at 10:00 a.m., August 16, 1971.

7 Appellant appeared and was represented by his attorney, Charles  
8 T. Sharp of Clarkston. Respondent was represented by its attorney,  
9 Wick Dufford, assistant attorney general. A report of the proceedings  
10 was taken by Gene Heath of Clarkston.

11 Witnesses were sworn and testified and exhibits were admitted.  
12 Witnesses called by appellant were Frank B. Scheibe, Augusta (Mrs.  
13 Webb) Owens, Alfred Fryer, Ruby (Mrs. George) Watkins, Nick Ausman  
14 and Del Blevins. Witnesses called by the respondent were William  
15 Smith, Howard Powell, Jessie (Mrs. Verbie) Miller and Everett Ramsden.

16 Subsequently appellant moved to augment the record, a motion  
17 which respondent did not oppose. The motion having been granted, the  
18 written certification of M. L. Sanstrom, was added to the testimony.

19 On the basis of testimony heard and exhibits examined, the  
20 Pollution Control Hearings Board makes the following

#### 21 FINDINGS OF FACT

##### 22 I.

23 The spring at issue in this hearing, known as Peterson Spring  
24 and by other names in earlier times, long has been a dependable  
25 but limited, source of water for both domestic use and stock watering.  
26 With some seasonal fluctuations, it flows at about seven gallons

27 FINDINGS OF FACT,  
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1 a minute.

2 II.

3 At least since the turn of the century, Peterson Spring was used  
4 as a source of water by nearby residences and sawmills. Picnic  
5 parties and summer campers used its water at the spring site.

6 III.

7 Appellant plans to install a six gallon per minute submersible  
8 pump in Peterson Spring, which is located on land he owns, to main-  
9 tain water in a 1,250 gallon reservoir for domestic uses of a  
10 maximum of 21 homesites in two platted areas he is developing and  
11 selling to individual owners, Scheibe's Blue Mountain Homesites and  
12 Scheibe's Blue Mountain Homesites, 2d Addition (permit application  
13 is for 5.4 gallons per minute). The homesites, except for one year-  
14 around residence, are used as a summer and winter recreational  
15 property. At the time of the hearing, there were seven cabins, one  
16 tent site, one permanent home and one cabin under construction on  
17 the platted areas. Appellant, who retains water rights when he  
18 sells his land, testified he has a "moral" obligation to develop a  
19 community water supply. All lots are reached by a water supply pipe  
20 system. A well now produces something less than three gallons per  
21 minute of water for the present occupants of the land. A second  
22 well, sunk to 450 feet, failed to produce water.

23 IV.

24 Forming to the south and east of the platted areas and flowing  
25 through them to a junction with Wormell Creek about a mile north of

1 the Scheibe areas, is Huber Gulch Creek. Since 1879, this creek has  
2 been used for summer stock watering, both above and below the Scheibe  
3 areas. The flow of water in the creek has extreme fluctuations. In  
4 June of this year, after a winter and spring of heavy snow and rain, it  
5 was flowing through the Scheibe areas at 1,200 gallons per minute.  
6 But in August, after a month of dry weather, the flow was down to  
7 20 or 25 gallons per minute.

8 V.

9 Peterson Spring is a tributary, but not the only spring tributary  
10 to Huber Gulch Creek in the area of the Scheibe plats. The creek  
11 normally has less water above the Scheibe areas than it does after  
12 it passes Peterson Spring. Below the Scheibe areas during the  
13 dry season the creek normally contains "pot holes" of fresh water  
14 even though there may not be a continuous flow of water over the  
15 surface of the creek bed. Some of the Peterson Spring contribution  
16 to Huber Gulch Creek is subterranean.

17 VI.

18 Mr. and Mrs. Verbie Miller, owners of property through which  
19 Huber Gulch Creek flows below the Scheibe areas, have protested  
20 Surface Water Application No. 22637 on the grounds that lessening  
21 the tributary contribution by Peterson Spring to the creek would  
22 impair their use of the creek for watering of their 72 head of  
23 cattle. Mrs. Miller testified the creek went completely dry in their  
24 area in the summer of 1970 after the creek flow was shut off by a dam  
25 on the Scheibe property below Peterson Spring (the dam subsequently  
26 washed out).

VII.

Expert, qualified witnesses testified that heavy withdrawal of water from Peterson Spring for the proposed community system would impair the flow of water in Huber Gulch Creek for stock watering below the spring. Other witnesses, who did not qualify as experts in hydraulic matters, said they did not believe the withdrawal proposed would impair the creek for stock watering purposes.

In accordance with these facts, the Pollution Control Hearings Board comes to these

CONCLUSIONS

I.

This is not an adjudication of existing water rights. The Pollution Control Hearings Board is not the proper tribunal for such an adjudication (RCW 90.03). Rather, this is a testing, by appellant, of the merits or demerits of the denial, by respondent, of Surface Water Application No. 22637.

II.

The question then becomes a matter of whether appellant's proposed withdrawal of water from Peterson Spring, a principal tributary to Huber Gulch Creek, seriously would impair downstream existing rights.

III.

The facts support respondent's contention that diversion of Peterson Spring would interfere with existing rights. Included in those rights is stock watering, an uninterrupted historic practice on Huber Gulch Creek. Such stock watering rights have been specifically protected by the Legislature (RCW 90.22).

FINDINGS OF FACT,

IV.

The above conclusions give ample legal basis for a finding upholding respondent's denial of the water application. But this case also may have developed a larger issue. It is one which was not discussed at either hearing, is not mentioned in the pleadings or briefs and now is only seen dimly in this final discussion of the case. Yet it may be of paramount consideration in this and in other cases of its kind in the future.

There is an excess of 1,500 gallons a minute flowing down Huber Gulch Creek during certain months of the year. An "unconscionable waste" of water (to quote RCW 90.22.040) is certainly taking place when at other seasons of the year we have to choose between water for homesites and water for cattle. With adequate planning by all parties there should be an abundance of water for both homesites and cattle.

In accordance with these conclusions, the Pollution Control Hearings Board issues this

ORDER

The appeal is hereby denied and the action of respondent in denying Surface Water Application No. 22637 is sustained and upheld.

DONE at Olympia, Washington this 7th day of March, 1972.

POLLUTION CONTROL HEARINGS BOARD

Matthew W. Hill  
MATTHEW W. HILL, Chairman

Walt Woodward  
WALT WOODWARD, Member

James T. Sheehy  
JAMES T. SHEEHY, Member

FINDINGS OF FACT  
CONCLUSIONS AND ORDER

1 In my concurrence with the above Findings of Fact, Conclusions  
2 and Order, I wish to add an additional reason not deemed material in  
3 this case by either Judge Hill or Mr. Sheehy.

4 I come to this point by first acknowledging considerable sympathy  
5 for the appellant, a sincere suburban tract developer who is trying  
6 to find an adequate source of water for the water system of his  
7 recreational homesite areas. But in taking much, or, at times, most  
8 of the water from Peterson Spring, he would be lessening to a great  
9 extent the downstream flow of Huber Gulch Creek. The immediate losers  
10 in such a withdrawal of water would be cattle, and cattle have certain  
11 stock water rights, as we have noted.

2 But is not the larger issue the serious diminution of or  
13 irreparable loss of Huber Gulch Creek itself?

14 This cannot be a case, as appellant argues in his brief, of  
15 the "unjust . . . (depriving of) over 40 landowners . . . of the  
16 use and benefit of the waters of the . . . creek in favor of one  
17 occasional user. . ." Rather it is what those 40 landowners would  
18 do to the environment, the ecology and the life cycles inherent in  
19 and dependent upon Huber Gulch Creek. Stock watering is only one  
20 manifest sample of all the ecosystems so dependent upon even such a  
21 small creek.

22 It is not appellant's "fault" that he has established a  
23 popular recreational homesite area near that creek. It is not the  
24 homeowners' "fault" that they have chosen this attractive site.

5 But the hard fact is that their proposed demand on the waters of  
26 that creek is quite likely, at least in dry weather months, to  
27 destroy the creek as a living water body.

FINDINGS OF FACT,

1 Is man, in his restless and ever increasing search for homesites,  
2 thus to dry up all the Huber Gulch Creeks? Because all life on this  
3 earth is related, those small water courses, including the one in  
4 Asotin County called Huber Gulch Creek, surely have their highest  
5 feasible development in the maintenance of their ecosystems. And,  
6 as RCW 90.03.290 comments, ". . . where the proposed use . . .  
7 threatens to prove detrimental to the public interest, having due  
8 regard to the highest feasible development of the use of the waters  
9 belonging to the public, it shall be the duty of the supervisor to  
10 reject such application . . ." (Emphasis added.)

11 Perhaps then what we face here is not just a simple water right  
12 application. It may be that the abiding issue is not water for  
13 man's recreation, but water for the preservation of environmental  
14 quality essential to the related life cycles upon which man's very  
15 survival depends.

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18 WALT WOODWARD, Member  
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